EDITOR'S NOTE

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NO. 85-5348

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

DAVID L. BUCHANAN,

PETITIONER

-v.-

COMMONWEALTH OF KENTUCKY,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

COUNSEL FOR PETITIONER

PETITION FOR CERTIORARI FILED AUGUST 12, 1985

30 pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER PETITIONER'S TRIAL BY A "DEATH-QUALIFIED" JURY WHERE HE DID NOT FACE THE SANCTION OF CAPITAL PUNISHMENT, VIOLATED DUE PROCESS OF LAW BY EFFECTIVELY IMPANELLING A CONVICTION-PRONE JURY, AND FURTHER, DENIED PETITIONER DUE PROCESS AND HIS SIXTH AMENDMENT RIGHTS BY EXCLUDING A JURY CHOSEN FROM A FAIR CROSS-SECTION OF THE COMMUNITY?

WHETHER APPELLANT'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCESS OF LAW WHERE EVIDENCE FROM A POST-ARREST COMPETENCY EVALUATION WAS ADMITTED AGAINST HIM AT TRIAL?

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Petitioner, David Buchanan, respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky entered on June 13, 1985.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on June 13, 1985, and was designated to be published. [Appendix, hereinafter A., pp. 1-7].

JURISDICTION

The opinion of the Supreme Court of Kentucky was rendered on June 13, 1985. No rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . ..

The Sixth Amendment to the United States Constitution, which states in pertinent part:

> . . . the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . .

The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> . . . nor shall any State deprive any person or liberty . . . without due process of law. . ..

STATEMENT OF CASE

David Buchanan (Petitioner herein) was indicted with Kevin Stanford for the murder, robbery, rape, and sodomy of Baerbel Poore.

Prior to trial, Buchanan moved to preclude "death qualification" of the jury during the guilt-innocence phase of the trial. Alternatively, he moved for separate juries for the guilt-innocence phase and sentencing phases of the trial.

Also prior to trial, Petitioner moved the trial court to order that Count I (Murder) be prosecuted as a Class A felony, rather than as a capital offense. Specifically, he argued that the Commonwealth's evidence was that Petitioner was not the "trigger man," and further, that he did not have "shared intent" with Kevin Stanford to kill the victim. Accordingly, Petitioner argued, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) precluded the availability of the death sentence. The trial court granted Petitioner's motion, specifically noting that the Commonwealth had no objection thereto, and further, that the Assistant Commonwealth Attorney conceded that "(the) death penalty would be unconst[itutional] for Buchanan under Enmund v. Fla."

Trial commenced on August 2, 1982. Prior to selection of the jury, Petitioner renewed his motion to preclude "death qualification" of the jury, particularly in view of the fact that he could not be subject to the death penalty. The court overruled Petitioner's motion. The court then proceeded to death-qualify the venire. From this death-qualified venire, a jury was impaneled to try the case.

At trial, M. K. Nalley testified that in January, 1981, he was a county correctional officer on duty at the Juvenile Detention Center. He testified that he asked Petitioner's co-defendant, Kevin Stanford, who was being detained at the Center at that time, why he killed the victim. According to Nalley, Stanford replied that "I had to shoot her, the bitch lived next door to me and she would recognize me."

At the close of the Commonwealth's case, Petitioner moved for a directed verdict as to the murder charge. Specifically, Petitioner argued that, since the Commonwealth's evidence was that Kevin Stanford shot the victim, the Commonwealth would be required to prove evidence of a plan, conspiracy, or such facilitation by David Buchanan as would rise to accomplice liability to the murder. Given that a third accomplice, Troy Johnson, testified that David Buchanan had assured him that no one

would be hurt, the Commonwealth's evidence was uncontradicted that there was in fact no plan to commit a murder. The Commonwealth responded that, if Petitioner were participating in either the robbery, sodomy or rape, "he qualified as a complicitor and therefore, is subject to, basically, the same penalty as the individual who did the killing." The court agreed "that's my understanding of the law, too. . ." The court overruled the motion for directed verdict.

Petitioner then called Ms. Martha Elam on his behalf. Ms. Elam testified that she was a social worker with the Department of Human Resources, and that her duties included working with juveniles who have been committed to the Department. She testified that Petitioner was first committed to the Department on May 1, 1980. At that time he was placed at Danville Youth Development Center. Approximately one month later, Petitioner was evaluated by a psychologist, Dr. Michael Neetzle. The test results showed Petitioner to have a full scale IQ of 74. There were also indications of emotional disturbance. The pattern of his test responses suggested a mild thought disorder.

As a result of that psychological evaluation, Petitioner was transferred to Northern Kentucky Treatment Center, a facility for emotionally disturbed youths. At Northern Kentucky, he was evaluated by Dr. Robert Nolker. Dr. Nolker's report concurred in the previous diagnosis of thought disorder. The tests revealed Petitioner's thinking to be "extremely simplistic and very concrete." Furthermore, Dr. Nolker found Petitioner to be "pretty severely emotionally disturbed . . . very easily confused . . . extremely limited capacity for insight . . . [and] easily led by other more sophisticated delinquents or youths." At the time of his evaluation, Dr. Nolker felt that Petitioner had "potential for developing a full-blown schizophrenic disorder." The date of Dr. Nolker's report was August 21, 1980. This was some four-and-a-half months prior to the offense for which Petitioner eventually was tried.

Subsequently, Petitioner was admitted for treatment to Northern Kentucky Treatment Center. A progress report of September 26, 1980, indicated that Petitioner continued to be extremely resistent to all treatment methods utilized up to that date. Nonetheless, some two weeks later, on October 10, 1980, the director of Northern Kentucky Treatment Center sent a letter to Judge Snyder of the Jefferson County Juvenile Court indicating that Petitioner would be able to function more positively in the community, and that he would be released some time within two weeks from the date of the correspondence. Three days later, Petitioner was released from Northern Kentucky Treatment Center and placed at home with his mother. He was placed in the regular academic program at Pleasure Ridge Park High School. Later, Petitioner was transferred to Butler High School and placed in an Educable Mentally Handicapped (EMH) Program. However, he did not attend school regularly. Nonetheless, the Department of Human Resources took no administrative action to revoke Petitioner's "home supervised placement" prior to his arrest on January 16, 1981.

On cross-examination, the prosecutor attempted to elicit information from evaluations done subsequent to Petitioner's arrest, with regard to his competence to stand trial. Petitioner objected to the introduction of the results of any competence evaluations. Specifically, Petitioner asserted that a determination of competence to stand trial was not relevant to rebut a diagnosis of emotional disturbance, and that the criteria by which the different determinations are made are not related. Additionally, Petitioner objected that the reports could not be used because he was in custody, and was not informed that he could have counsel present during the testing procedure, nor was he told that anything he said during the competence evaluations could be used against him at trial. However, the court overruled the objection and allowed the witness to read from the competence evaluations.

Ms. Elam then read from an evaluation done by Dr. Robert Ryan, M.D., on August 14, 1981. The report indicated that "David was appropriate interactionally . . . in good reality contact . . . and seemed to be function in full normal IQ range."

During the instruction conference, Petitioner objected to giving any murder instruction, based upon the same grounds as previously raised in his motion for a directed verdict. With regard to the homicide, the trial court instructed the jury on intentional murder (complicity); wanton murder; manslaughter first degree; manslaughter second degree; and reckless homicide.

In his closing argument, the prosecutor referred to Petitioner's competency evaluation in August, 1981 (some seven months after the offense in question) in order to rebut Petitioner's evidence of emotional disturbance: "All the material which he read to you, do you remember when he put Miss Elam on, he didn't mention anything with mention to that last psychological or psychiatric evaluation."

With reference to the murder charge, the prosecutor stated that he was not asking the jury to find appellant guilty of intentional murder:

> I am not asking you to find him guilty under Instruction Number 1. You see and the reason I'm not, to be perfectly honest with you, our position is that the evidence points that that's the man [Stanford] who pulled the trigger, you see. His [Buchanan's] involvement comes up because he was involved in the conspiracy to commit the robbery initially because he is the individual that started the ball to rolling which lead to the taking of the life of Baerbel Poore. He is the individual that went into the Checker Station and apparently agreed with Kevin Stanford that they were going to rape and they were going to sodomize the young lady. He gets involved in the murder because there was apparently an agreement to remove her from the Checker Station and take her down Shanks Lane and, as he told Troy, they were going to get some more. The reason that he is guilty, ladies and gentlemen, under Instruction Number 2 is that during the continuation of the extension of those conspiracies, because of the fact that he actually traveled down to the car to debase her some more; to violate her

> some more; that means the conspiracy was still continuing . . . In Instruction Number 2, you convict him of murder because he involved himself in crimes which the ordinary person knows can lead to the loss of life. You will convict him under that instruction, it says, a wanton, indifference to the value of human life, because when he got the weapon. . . we know he was indifferent to anybody's life but his. . . [T.E., Vol. IX, pp. 1336-1337].

After deliberating, the jury convicted Petitioner of intentional murder under Instruction No. 1, and fixed his punishment at life imprisonment. Final judgment in conformity with the jury verdict was entered on September 17, 1982.

APPELLATE HISTORY

On direct appeal, the Supreme Court of Kentucky affirmed Petitioner's conviction, holding that death-qualification of the jury did not necessarily result in an extraordinarily conviction-prone jury or make the panel "unrepesentative of a fair cross-section of the community." The Court cited People v. Kirkpatrick, 70 Ill.App. 3d 166, 387 N.E.2d 1284 (1979), for the proposition that "no reviewing court has found any valid data indicating that a death-qualified jury is conviction prone."

The Court further held that "(p)ersons who are unalterably opposed to capital punishment do not constitute a cognizable group for the purpose of the fair cross-section requirement."

Additionally, the Court said evidence of Petitioner's competency report did not violate his privilege against self-incrimination because it "contained no inculpatory statements by Buchanan or any acusatory observation by the examiner. . ."

Lastly, the Court said Petitioner "waived his right to silence by giving the police a confession," thus any error in admitting the competency report was "nonprejudicial and harmless beyond a reasonable doubt. . ."

REASONS FOR GRANTING THE WRIT

THIS IS A CASE OF FIRST IMPRESSION FOR THIS COURT, WHEREIN THE COURT MUST RESOLVE THE QUESTION OF WHETHER A CO-DEFENDANT'S TRIAL BY A "DEATH

QUALIFIED" JURY, WHERE HE DID NOT FACE THE SANCTION OF CAPITAL PUNISHMENT, VIOLATED DUE PROCESS OF LAW BY EFFECTIVELY EMPANELLING A CONVICTION-PRONE JURY, AND FURTHER, DENIED PETITIONER DUE PROCESS AND HIS SIXTH AMENDMENT RIGHTS, BY EXCLUDING A JURY CHOSEN FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

ADDITIONALLY, THIS COURT MUST DECIDE IF PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCESS OF LAW WHERE EVIDENCE FROM A POST-ARREST COMPETENCY EVALUATION WAS ADMITTED AGAINST HIM AT TRIAL.

The Sixth Amendment to the Federal Constitution guaranatees the right of a defendant to be tried by a jury drawn from a fair cross-section of the community. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Prior to trial, Petitioner moved the court to either preclude "death-qualification," or to impanel two juries for the bifurcated trial, one to assess guilt, and another to impose sentence. [At the time of his motion, Petitioner faced a possible sentence of death if convicted]. However, the court refused both requests.

Subsequently, the court ruled, and the prosecution agreed, that Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), precluded the imposition of the death penalty for Petitioner. At trial, counsel for Petitioner renewed his motion to preclude "death-qualification" or for separate juries, contending that a "death-qualified" jury would be significantly more "prosecution-oriented." The court overruled the motion. By requiring that Petitioner be tried by a "death-qualified" jury, the court denied Petitioner a jury drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1974).

In Petitioner's case, the selection of the jury pursuant to procedures authorized for capital defendants by Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), served to produce a jury statistically more likely to convict, and to be more severe when it came to sentencing. The requirement

that jurors be selected from a cross-section of the community does not guarantee that the jury so drawn will in fact be representative. Nonetheless, the selection process must not exclude an identifiable group. This is precisely what occurred in Petitioner's trial. Jurors who had conscientious scruples against the imposition of a death sentence were excluded, despite the fact that the ultimate penalty was unavailable for their consideration.

As the United States Supreme Court stated in Duren v. Missouri, 493 U.S. 357, 368, note 26, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979):

> "in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is an adequate justification for the infringement. . ."

Exclusion may be justified only by the showing of a significant state interest, and the Commonwealth has the burden to show that interest. Taylor, supra 419 U.S. at 534.

The state had no legitimate interest in death-qualifying jurors in Petitioner's case. The state had conceded the Petitioner could not be tried as a capital defendant. The impanelling of a death qualified jury only served the state's interest of having a prosecution-oriented panel.

Prior to trial, counsel for Petitioner had tendered to the court a study, Some Data on Juror Attitudes Towards Capital Punishment by Hans Zeisel, published by the Center for Studies in Criminal Justice at the University of Chicago Law School. The state neither challenged the study, nor presented any contravening evidence. The data relied on by the author showed that a significant percentage of the United States population was opposed to capital punishment. In that Witherspoon-questioning excluded this significant segment of the population from Petitioner's jury, it logically follows that Petitioner was denied a representative jury. While the state may well have had an adquate justification to exclude those prospective jurors with scruples about the death penalty from the co-defendant's jury, it merely served to

systematically exclude jurors otherwise qualified to hear Petitioner's case.

The United States Supreme Court recognized, in Justice Stewart's note in Witherspoon, supra, 391 U.S. 520 footnote 16, that in 1966, approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. If these figures are still reasonably accurate, then approximately 47% of the community were excluded as jurors from Petitioner's venire.

Petitioner would further submit the following language from Witherspoon, 391 U.S. 520-521, 88 S.Ct. 1776 applies in the case at bar:

> If the state had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment, and all who opposed it in principle, the state crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the state produced a jury uncommonly willing to condemn a man to die.

In the instant case, only jurors who could consider the death sentence for a capital co-defendant were allowed to decide the guilt and impose the sentence on the non-capital Petitioner. The court, in effect, had produced a jury "uncommonly willing" to impose the most severe punishment.

A conflict among the federal circuits has arisen over this issue as it applies to defendants facing the sanction of capital punishment. In Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), the Court held that a capital jury, with jurors who hold absolute scruples against the death penalty excluded for cause, violates a defendant's Sixth Amendment right to a jury composed of cross-sectional representation of a given community. In affirming the district court's decision, the Grigsby Court cited extensive evidence supporting the lower court's finding that a jury with "Witherspoon excludables" stricken for cause is a conviction-prone

jury. 758 F.2d at 232.

It is important to re-emphasize that the debate over the constitutionality of death-qualified juries has heretofore involved defendants who are tried for capital offenses. Petitioner did not face the sanction of capital punishment, yet he was tried before a death-qualified jury. As noted above, Petitioner tendered data to support the proposition that death-qualified jurors were more prone to convict and it was not rebutted.

The trial court's failure to impanel a separate, non-death-qualified jury on behalf of Petitioner deprived him of due process and of his Sixth Amendment right to have a jury selected from a representative cross-section of the community.

PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCESS OF LAW WHERE EVIDENCE FROM A POST-ARREST COMPETENCY EVALUATION WAS ADMITTED AGAINST HIM ~~AT TRIAL~~.

After proceedings were initiated in Juvenile Court upon the same charges which were transferred to the Circuit Court for trial, and while Petitioner was in the custody of the Jefferson County Youth Detention Center, Petitioner was examined to evaluate his competency to stand trial, pursuant to an order of the Jefferson District Juvenile Court. The examining doctor determined that Petitioner was competent. No issue was ever raised by Petitioner as to his competency to stand trial. During his trial, Petitioner presented evidence from his social worker, an employee of the Commonwealth of Kentucky. During the course of her professional relationship with Petitioner, she had access to, and relied upon, certain psychological evaluations which had been done by agents or employees of the Commonwealth of Kentucky during the course of Petitioner's commitment to the Department for Human Resources. During the course of the prosecutor's cross-examination, he inquired of Ms. Elam, the social worker, whether she had any psychological reports subsequent to those to which she had referred during her direct examination. Petitioner objected to the use of any reports which were done as a result of

a court ordered competency evaluation. Specifically, counsel stated:

> Judge, I've other grounds for objections. One, is that this would have been completed at the time David was given these tests, I believe that's prejudicial because it was done at the insistence of Court and counsel was not present and was not informed he could be present and David was not informed, at that time, that they could be used against him as he went to trial and I would cite Estelle versus Commonwealth [sic], which indicates that the defendant has a 5th Amendment right to be told that it may later be used against him and I would object on that ground, also.
>
> The court overruled the motion.

In Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d, 359, 101 S.Ct 1866 (1981), the United States Supreme Court held that the admission of testimony by a psychiatrist who conducted a court-ordered pretrial competency examination violated both the defendant's Fifth Amendment privilege against self-incrimination, and also the defendant's Sixth Amendment right to counsel. In that case, Ernest Benjamin Smith was indicted for capital murder. Prior to trial, the Texas trial court ordered a psychiatric examination of Smith to determine his competency to stand trial. During the penalty phase of Smith's trial, a Dr. Grigson, who had interviewed Smith to determine his competency, testified, based upon information derived from his "mental status examination" of Smith, regarding Smith's diagnosis, his poor prognosis, and his lack of remorse.

On appeal to the United States Supreme Court, the Court reversed. The Court specifically refuted the state's contention that neither the Fifth nor the Sixth Amendments were implicated. With regard to the Fifth Amendment, the court observed that:

> In Miranda v. Arizona, [cite omitted], the court acknowledged that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation

of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." [Cite ommitted]. Thus, absent other fully effective procedures, a person in custody must receive certain warnings before any official interrogation, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." [Cite omitted]. The purpose of these admonitions is to combat what the Court saw as "inherently compelling pressures" at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for "an intellectual decision as to its exercise."

> The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competency and testified for the prosecution at the penalty phase on a crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in the post-arrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] perso[n] acting solely in his interest." [Cite omitted]. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that accordingly, he had a constitutional right not to answer the questions put to him.

Consequently, the Supreme Court held that Smith's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase. These same considerations compel that result here. Petitioner was in custody when the examination was conducted at the instance of the Juvenile Court. Petitioner was given no warnings that his responses could

be used against him at trial. Even though Dr. Ryan, who evaluated Petitioner, did not testify, his report was nonetheless used to discredit Petitioner's claim of emotional disturbance. Consequently, without warnings, the introduction of testimony based upon Dr. Ryan's report violated Petitioner's Fifth Amendment rights.

Also in Estelle v. Smith, supra, the United States Supreme Court concluded that a defendant had a Sixth Amendment right to the assistance of counsel before submitting to the psychiatric examination. The court stated:

> Here, respondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail, and their interview proved to be a "critical stage" of the aggregate proceedings against respondent. [Cite omitted]. Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." [Estelle v. Smith, supra, 451 U.S. at 470-471].

Notably, the Supreme Court did not find that Smith had the right to have counsel actually present at the competency evaluation.

In fact, the Court seemed to approve the recognition by the Court of Appeals that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." [Id, 451 U.S. 470, fn. 14]. Rather, the crux of the holding of the Supreme Court was that Smith had a Sixth Amendment right to consult with counsel prior to the evaluation, and further, to make an intelligent decision as to whether or not to participate in the examination, based upon counsel's advice as to any use to which the state might put the results of the examination. The same holds true for Petitioner's case. The Juvenile Court ordered the evaluation in question. There was never any notice to counsel that the state would use the results of that evaluation after Petitioner's transfer to adult

court, and during the trial of the state's case-in-chief in order to prejudice a material aspect of Petitioner's defense. This was precisely the concern of the Supreme Court in Estelle v. Smith in finding a violation of Smith's Sixth Amendment right to counsel:

> As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult . . . even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's bias and predilections, [and] of possible alternative strategies at the sentencing hearing." [Cite omitted]. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without "the guiding hand of counsel." [Estelle v. Smith, supra, 451 U.S. 471].

Because the introduction of evidence from Petitioner's competency evaluation by Dr. Ryan was introduced against him at trial, and further, because neither Petitioner nor his counsel were advised that his responses would be used against him, the introduction of such evidence violated both the Fifth and Sixth Amendments.

CONCLUSION

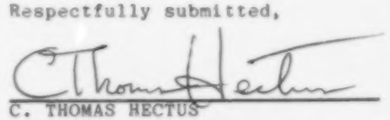
Petitioner's trial by a "death-qualified" jury, where he did not face the sanction of capital punishment, violated due process of law and petitioner's Sixth Amendment rights by empanelling a conviction-prone jury and one which was not composed of cross-sectional representation of the community.

There is a conflict among the federal circuits on the question of the constitutionality of th death-qualified jury for defendants facing capital punishment. Since the charges against petitioner did not rise to that level, it was fundamentally unfair for his case to be tried to a death-qualified jury.

Furthermore, petitioner's conviction was obtained in violation of due process of law where evidence from a post-arrest competency evaluation was admitted against him at trial in violation of this Court's holding in Estelle v. Smith.

Because the decision of the Supreme Court of Kentucky in this case conflicts with previous holdings of this Court, a Writ of Certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,



C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

COUNSEL FOR PETITIONER

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Supreme Court of Kentucky

83-SC-58-MR

DAVID BUCHANAN — APPELLANT

V. — APPEAL FROM JEFFERSON CIRCUIT COURT
HON. CHARLES M. LEIBSON, JUDGE
82-CR-0406

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

AFFIRMING

This appeal is from a judgment based on a jury verdict which convicted Buchanan of murder, robbery, rape and sodomy and sentenced him to life in prison.

The questions presented are whether the trial by a death-qualified jury where Buchanan did not face capital punishment violated due process by excluding a jury panel composed from a fair cross-section of the community, whether there was sufficient evidence to support the finding that Buchanan intended the victim's death, whether there is sufficient evidence to support a finding that he was not acting under extreme emotional disturbance at the time of the murder, whether the trial judge properly allowed the prosecution to introduce evidence of the competency evaluation, and whether the evidence of competency did violate his privilege against self-incrimination.

Barbel Poore was raped, sodomized and murdered in connection with the robbery of a gas station in Louisville on January 7, 1981. She, a 20-year-old service station attendant, was shot twice in the head. Kevin Stanford was convicted as the trigger man. Buchanan accompanied Stanford and was also convicted of murder. Both Stanford and Buchanan were tried together. Stanford was sentenced to death, but Buchanan received a life sentence. This appeal followed.

This Court affirms the judgment of the circuit court.

In a joint trial for capital murder where the death penalty is sought against one defendant, but not the other, the impaneling of a death-qualified jury does not deprive the defendant of the right to a trial by a fair and impartial jury selected from a fair cross-section of the community.

Buchanan's pretrial motion to preclude death-qualification of the jury or to postpone such voir dire until the penalty phase of the trial was overruled. The jury was death-qualified individually by the trial judge prior to the guilt phase of the trial. We find no merit in the argument that such a process necessarily resulted in an extraordinarily conviction-prone jury or that it excluded a recognizable group from the jury panel so as to make the panel unrepresentative of a fair cross-section

of the community.

We are not persuaded by the authority of Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark., 1980). Buchanan's arguments have been consistently rejected in other jurisdictions, see Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978); United States ex rel. Clark v. Fike,538 F. 2d 750 (7th Cir. 1976);Craig v. Wyse, 373 F. Supp. 1008 (D.D.C. 1974); Martin v. Blackburn, 521 F. Supp. 685 (E.D.La. 1981); State v. Heyman, S.C., 281 S.E.2d 209 (1981); People v. Lewis, 88 111.2d 1129, 430 N.E.2d 1346 (1981); State v. Ortiz, 88 N.M.2d 370, 540 P.2d 850 (1975); Hovey v. Superior Court of Alameda County, Cal., 616 P.2d 1301 (1980).

People v. Kirkpatrick, 70 Ill. App. 3d 166, 26 Ill. Dec. 356, 387 N.E. 2d 1284 (1979) noted that no reviewing court has found any valid data indicating that a death-qualified jury is conviction prone. A death-qualified panel tends to ensure those who serve on the jury to be willing and able to follow the evidence and law rather than their own preconceived attitudes. Such a process furthers the interests of both the defendant and prosecution in presenting the case to an impartial jury. See Gall v. Commonwealth, Ky., 607 S.W. 2d 97 (1980); Meyer v. Commonwealth, Ky., 472 S.W. 2d 479 (1971).

Buchanan's contention that death qualification excludes a cognizable group from the jury panel so as to make it unrepresentative of a fair cross-section of the community is also unconvincing. Persons who are unalterably opposed to capital punishment

do not constitute a cognizable group for the purpose of the fair cross-section requirement. Such persons have diverse attitudes which defy classifications and have not been singled out by the public for special treatment. They do not meet the criteria for making a cognizable class. United States v. Kleifgen, 557 F.2d 1293 (1977); Brown v. Harris, 666 F.2d 782 (2nd Cir. 1981). Opponents of capital punishment are not a distinct opinion-shaped group. See State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981). It was not reversible error to death-qualify the jury.

There is sufficient evidence in the record to support the jury finding that Buchanan intended the death of the victim.

There was testimony from Troy Johnson that Buchanan believed the robbery of the station would be easy because the victim was alone, but nonetheless supplied the bullets for the previously unloaded gun. Johnson also testified that Buchanan borrowed his brother's gun and bullets for use in the robbery, and that he did not believe Buchanan's assurances that the victim would not be harmed. Johnson had agreed to participate in the robbery until Buchanan acquired ammunition for the weapon and then Johnson refused to leave the car.

Buchanan planned the robbery; he acquired the murder weapon and the ammunition. He enlisted the assistance of Stanford and instructed Johnson throughout the affair to remain in his car and to follow the victim's car. Buchanan had the same

motive as Stanford for permanently silencing the victim. He knew that the victim could identify Stanford which meant that he would also ultimately be found. Considering the evidence as a whole, a reasonable jury could conclude that Buchanan intended the victim's death. Trowel v. Commonwealth, Ky., 550 S.W. 2d 530 (1977).

There is sufficient evidence to support the finding by the jury that Buchanan was not acting under extreme emotional disturbance at the time of murder. There is nothing in the record to support the argument that the murder was precipitated by extreme emotional disturbance. The entire sequence of events indicated a cold and calculating premeditated act by Buchanan. He sought the assistance of Stanford and Johnson, obtained a gun and bullets, and timed the robbery so that the victim would be closing the station and probably alone. Certainly this was not an unplanned event. See Brown v. Commonwealth, Ky., 555 S.W. 2d 252 (1977); Gall v. Commonwealth, supra.

The introduction by Buchanan of three Department of Human Resources reports is not evidence of extreme emotional disturbance. See Wellman v. Commonwealth, Ky., ___S.W.2d___ (Rendered June 13, 1985). Evidence of a mental defect alone does not support a defense of extreme emotional disturbance. Wellman, supra. There was sufficient evidence for a jury to find otherwise. There was a letter from DHR to Judge Snydor which noted Buchanan had benefited from treatment. The prosecution also introduced a Danville DHR report indicating that Buchanan was sophisticated, manipulative and cunning. There was also

evidence of Buchanan's August 17, 1981 competency report which indicated that he was functioning normally.

The trial judge properly allowed the prosecution to introduce evidence of Buchanan's competency evaluation.

Buchanan introduced evidence of three DHR reports relating to his mental condition which had been prepared for use by juvenile authorities several months before the crimes herein. The report which Mullins contests was cumulative to the DHR letter and report which already had been introduced into evidence. Buchanan opened the door for the introduction of the competency report by introducing only those DHR reports which were beneficial to him. The fact that the report was made for the purpose of determining his competency to stand trial did not render the objective observations contained therein inadmissible. There is nothing to indicate that Dr. Ryan, the author of the competency report, was any less qualified than the psychologist who prepared the other DHR reports. The evidence of the competency report was nonprejudicial and harmless beyond a reasonable doubt in view of the considerable evidence that the murder was well planned and premeditated. The evidence of the competency report did not affect the ultimate outcome of the the trial. Stiles v. Commonwealth, Ky.App., 570 S.W.2d 645 (1978).

The evidence of Buchanan's competency report did not violate his privilege against self-incrimination. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 88 L.Ed.2d 359 (1981).

is distinguishable from this case. In Smith, supra, the defendant was incriminated by his remarks to the examiner. In this case, the report contained no inculpatory statements by Buchanan or any accusatory observation by the examiner who merely recited his observations of Buchanan's outward appearance.

When Dr. Ryan examined Buchanan, he had waived his right to silence by giving the police a confession. Parrish v. Commonwealth, Ky., 581 S.W.2d 560 (1979). Any error in admitting the competency report was nonprejudicial and harmless beyond a reasonable doubt in view of the confession and the overwhelming evidence of guilt. Stiles, supra.

The judgment is affirmed.

All concur, except for Leibson, J., who did not sit.

ATTORNEYS FOR APPELLANT:

C. Thomas Hectus
Gittleman & Barber
635 West Main Street
Louisville, Kentucky 40202

R. Allen Button
Appellate Public Advocate
Suite 304
635 West Main Street
Louisville, Kentucky 40202

ATTORNEY FOR APPELLANT:

Mark A. Posnansky
Assistant Public Advocate
3rd Floor, State Office Bldg.
Annex
Frankfort, Kentucky 40601

ATTORNEYS FOR APPELLEE:

David L. Armstrong
Attorney General
David A. Smith
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494

85-5348

IN THE
SUPREME COURT OF THE UNITED STATES
NO. _____, October Term, 1984

DAVID L. BUCHANAN
Petitioner,
vs.
COMMONWEALTH OF KENTUCKY
Respondent

* * * * * * * *

CERTIFICATE OF SERVICE

I, C. Thomas Hectus, counsel for Petitioner, certify that the attached Petition for Writ of Certiorari, Appendix, Motion for Leave to Proceed In Forma Pauperis, and Notice of Appearance was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, to be filed upon receipt, and served upon counsel for for Respondent, Hon. David L. Armstrong, Attorney General, and Hon. David A. Smith, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 12th day of August, 1985, by personally depositing same in a United States mailbox, first-class postage prepaid.

C. Thomas Hectus
C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

COUNSEL FOR PETITIONER

Subscribed and sworn to before me by C. THOMAS HECTUS, this 12th day of August, 1985.

My commission expires: 1-17-87.

Karen L Kutz
NOTARY PUBLIC
KENTUCKY, STATE AT LARGE

IN THE
SUPREME COURT OF THE UNITED STATES
NO. _____, October Term, 1985

85-5348

DAVID L. BUCHANAN)
)
Petitioner,)
)
vs.)
)
COMMONWEALTH OF KENTUCKY)
)
Respondent)

* * * * * * * *

NOTICE OF APPEARANCE

The Clerk will enter my appearance as counsel for Petitioner. I certify that I am a member of the Bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

C. Thomas Hectus

C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100
COUNSEL FOR PETITIONER

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)
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)
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* * * * * * * *

AFFIDAVIT OF MAILING

Comes the Affiant, C. Thomas Hectus, a member of the Bar of this Court, pursuant to Rule 28.2 of the Rules of this Court, being first duly sworn, and states as follows:

1. On August 12, 1985, a Petition for a Writ of Certiorari to be filed on behalf of the Petitioner was deposited in a United States mailbox at Louisville, Kentucky, with first-class postage prepaid. Said Petition for Writ of Certiorari was properly addressed to the Clerk of this Court.

2. In the knowledge of the Affiant, the mailing of the Petition for a Writ of Certiorari took place on August 12, 1985, and is within the time permitted for filing the Petition pursuant to Rule 20.1 of the Rules of this Court.

FURTHER THE AFFIANT SAYETH NOT.

C. Thomas Hectus

C. THOMAS HECTUS

Subscribed and sworn to before me by C. THOMAS HECTUS, this 12th day of August, 1985.

My commission expires: 12-4-88.

Laura E Hoskins

NOTARY PUBLIC
KENTUCKY, STATE AT LARGE

35-5348

CERTIFICATE

I do hereby certify that a copy of this motion was served by depositing same in a United States mailbox, with first-class postage prepaid, to Hon. David L. Armstrong, Attorney General, and Hon. David A. Smith, Assistant Attorney General, Counsel for Respondent, Capitol Building, Frankfort, Kentucky 40601, on August, 12, 1985.

C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100
COUNSEL FOR PETITIONER